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Supreme Court, U.S.
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No. 09-234

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2009

WALTER A. McNEIL,

Petitioner,

v.

WILLIAM GREG THOMAS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN LIGHT OF CERTIORARI GRANT IN *HOLLAND V. FLORIDA*, CASE NO. 09-5327

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CAPITAL CASE

QUESTION PRESENTED

(Restated)

In a capital habeas proceeding, does 28 U.S.C. § 2254(i), which provides that the "ineffectiveness or incompetence" of post-conviction counsel "shall not be grounds for relief in a proceeding arising under section 2254," prohibit a district court from ever equitably tolling the limitations period for habeas petitions based on the affirmative misconduct of court-appointed counsel?

ARGUMENT

The Respondent files this supplemental brief pursuant to Rule 15.8 to address this Court's grant of review in a very similar case and to explain why a writ of certiorari should be granted here so that the two cases can be considered together. On October 13, 2009, this Court granted a writ of certiorari in *Holland v. Florida*, Case Number 09-5327. That case involves a dispute as to which of two potential standards should govern a claim of equitable tolling based on the conduct of counsel. But there is a third possible standard, and this Court should grant the State's petition in the instant case so that there will be full briefing on all three.

The three potential standards are (1) gross negligence[1] of counsel can support equitable tolling, (2) affirmative misconduct of counsel beyond negligence can support equitable tolling, and (3) the conduct of counsel can never support equitable tolling. Mr. Holland argues that the first standard should apply, while the State contends that the third standard should apply. Only Mr. Thomas is prepared to argue that the intermediate standard should apply.

To varying degrees of clarity, the courts of appeals have split among these three standards. The Second and Ninth Circuits have clearly applied equitable tolling based on the conduct of counsel that was grossly negligent even though it did not rise to the level of any intentional misconduct. *Baldayaque v. United States*,

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[1] This Court has summarily held that counsel's simple miscalculation of the deadline cannot support equitable tolling. *Lawrence v. Florida*, 549 U.S. 327, 336-37, 127 S. Ct. 1079, 1085, 166 L. Ed. 2d 924 (2007).

338 F.3d 145 (2d Cir. 2003); *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003). This is the standard that Mr. Holland argues this Court should adopt.

At the other extreme, the Seventh Circuit follows the standard advocated by the State – that no level of attorney misconduct can warrant equitable tolling. *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005).

A plurality of the courts of appeal to have addressed the issue apply the intermediate standard, which is the standard under which Mr. Thomas prevailed. The Third,[2] Fifth, Eighth, Tenth, and Eleventh Circuits have required conduct beyond negligence and into the realm of affirmative, intentional misconduct that includes some level of lying or deception by counsel. *Brown v. Shannon*, 322 F.3d 768 (3d Cir.), *cert. denied*, 539 U.S. 948, 123 S. Ct. 2617, 156 L. Ed. 2d 637 (2003); *United States v. Wynn*,292 F.3d 226 (5th Cir. 2002); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007); *Holland v. McNeil*, 539 F.3d 1334, 1339 (11th Cir. 2008). Although the State prevailed under that intermediate standard in *Holland*, its petitions in the instant case and in *McNeil v. Asay*, Case Number 09-216, demonstrate that its position is

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[2] The Third Circuit appears inclined to apply the more lenient gross negligence standard in capital cases, however. *See Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.) (holding that a lower standard should apply for equitable tolling in capital cases because "death is different"), *cert. denied*, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001). *Fahy*, however, did involve conduct by counsel; it involved a miscalculation of the deadline by the capital petitioner himself.

that *Holland* goes too far and that attorney conduct can never support equitable tolling.

If the Court grants review in the instant case, Mr. Thomas is fully prepared to argue that affirmative, egregious misconduct by counsel should support equitable tolling. Contrary to the record in the *Holland* case, the record in this case contains detailed factual findings by the district court that counsel engaged in egregious misconduct that caused Mr. Thomas's habeas petition to be untimely. Mr. Holland, who failed to prove anything more than gross negligence by his counsel, has no incentive to argue that affirmative misconduct should support equitable tolling. And the State has demonstrated in its petition in this case that it will argue that no level of attorney conduct, even the affirmative misconduct found by the district court in this case, can ever support equitable tolling. Thus, it is unlikely that the Court will have the benefit of merits briefing on the full picture of the issue unless it grants certiorari in the instant case and considers it as a companion to *Holland*.

The distinction between gross negligence and affirmative misconduct is extremely important to two issues underlying the general question of whether the actions of a habeas petitioner's counsel can ever support equitable tolling. Importantly, in light of the relative posture of their cases, Mr. Thomas is in a far better position to fully develop the defense argument on both issues.

First, the State argues in both *Holland* and this case that attorney conduct can never support equitable tolling because 28 U.S.C.§ 2254(i) (2006) provides that the "ineffectiveness or incompetence" of post-conviction counsel "shall not be

grounds for relief in a proceeding arising under section 2254." There are at least two arguments available to defeat this argument. The first is that the kind of "relief" referenced in § 2254(i) is the granting of a habeas petition and not the purely procedural decision to consider the merits of an otherwise untimely petition. Admittedly, Mr. Holland is in as good a position as Mr. Thomas to argue this issue. The second argument, however, is only available to Mr. Thomas. Specifically, Mr. Thomas is prepared to argue that § 2254(i) does not apply in misconduct cases because the terms "ineffectiveness or incompetence" simply do not encompass intentional misconduct. Because Mr. Holland concedes he can only prove gross negligence, this argument is simply not available to him.

The second underlying issue is whether the acts of counsel are attributed to his client under principles of agency. The Eleventh Circuit has identified agency principles as the key theoretical underpinning to the rule in many circuits that attorney negligence generally cannot support equitable tolling. *See Downs v. McNeil*, 520 F.3d 1311, 1319-21 (11th Cir. 2008) (collecting cases). And this argument carries some persuasive weight in the context of representation that is negligent, even grossly negligent. Thus, this argument will present a significant (though not necessarily insurmountable) hurdle to Mr. Holland.

But Mr. Thomas has an argument that is not available to Mr. Holland – that his counsel's affirmative misconduct defeated the agency relationship. As the Eleventh Circuit held in *Downs*, however, agency principles fall away when an attorney is actively working against the interest of his client. *See id.* at 1320-21

(explaining that general agency principles provide that a principal is not charged with the conduct of his agent "when the agent is acting adversely to the principal's interests" and agency principles should not bar equitable tolling "when an attorney's conduct is so egregious it amounts to a *de facto* termination of representation"). *See also Baldayaque*, 338 F.3d at 154 (Jacobs, J., concurring) (advocating that the equitable tolling issue should be governed by agency principles and that attorney conduct is imputed to the client unless he "acts in a manner completely adverse to" the client's interest).

In short, the Court's decision-making process on this extremely important issue on which the circuits are deeply divided would be well served by full briefing and oral argument on the merits of this intermediate standard.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and consider this case as a companion to *Holland*.

Respectfully submitted,

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